IN THE

Supreme Court of the United States

October Term, 1963.

No.

WALTER F. O'BRIEN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AS OF NO. 14,321.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Walter F. O'Brien respectfully represents:

REPORTS OF COURTS BELOW.

The opinion of the Court of Appeals for the Third Circuit is not as yet officially reported. It is printed in this petition (p. 12).

The opinion of the Tax Court of the United States is officially reported: *Walter F. O'Brien*, 38 T. C. 707, as cited by the Court of Appeals; but at this writing is not in bound volume. It was reviewed by the Court.

JURISDICTIONAL GROUNDS.

(i) On July 31, 1963, the United States Court of Appeals for the Third Circuit, on petition to review a decision of the Tax Court of the United States, entered a judgment affirming the decision of the Tax Court.

(ii) In view of the Per Curiam decision of the Court of Appeals affirming on the opinion of the Tax Court, no petition for rehearing was filed.

(iii) The jurisdiction of your Honorable Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Stat. 928 (28 U. S. C. A. 1254).

QUESTIONS PRESENTED.

1. Does "court proceedings" include the cost thereof and the fees of counsel?

2. Where "back pay" is recovered after litigation in three courts, is the income tax computed on the real economic benefit to the taxpayer, i. e., the net recovery after deduction of counsel fees and costs?

STATUTE INVOLVED.

The statute involved is *Section 1303* of the *Internal Revenue Code of 1954*, the pertinent text of which reads:

"Sec. 1303. Income from Back Pay.

"(a) Limitation on Tax. If the amount of the back pay **received** * * * by an individual during the taxable year exceeds 15 per cent of the gross income of the individual for such year * * *."

* * * * * *

"(b) Definition of Back Pay. For purposes of this section, the term 'back pay' means * * *:

"(1) Remuneration, including wages, * * * which would have been paid before the taxable year except for the intervention of one of the following events:

* * * * *

"(B) dispute as to the liability of the employer to pay such remuneration, which is determined after the commencement of court proceedings;

* * * * * *"

STATEMENT OF THE CASE.

The Court of Appeals for the Third Circuit affirmed a decision of the Tax Court holding that attorneys' fees and court costs could not be deducted before "spreading back" a back pay award.

In the year 1957, the taxpayer was awarded (in the Court of Claims) the sum of $16,173.05 for the four years, 1952 to 1955 inclusive, as damages for breach of contract of employment. His attorney received the check, deducted $8,243.11 for costs and counsel fee, and the taxpayer left the lawyer's office with a check he received from him for $7,929.94.

The courts below "spread back" the $16,173.05 over the four years; but allow the deduction of $8,243.11 in the one year—1957, the year the taxpayer received $7,929.94. The result is a deficiency in income tax of $1,628.07 plus interest at 6%.

The taxpayer was a United States civil service employee. He was wrongfully discharged by his superiors. He retained counsel. Suit for reinstatement was entered in the District Court of the United States for the District of Columbia. The District Court found that he had been wrongfully discharged, but did not order his reinstatement because the position had been abolished. On appeal, the Court of Appeals reversed and ordered his reinstatement to a similar position (233 F. 2d 17). He then sued for "back pay" in the Court of Claims, and recovered (151 F. Supp. 282).

His attorneys earned their fee.

JURISDICTION OF COURT OF FIRST INSTANCE.

Within ninety days of the issuance of a notice of deficiency by the Commissioner of Internal Revenue under Section 6212 of the Internal Revenue Code of 1954, the taxpayer petitioned the Tax Court of the United States for a redetermination under Section 6213 of said Code.

The decision of the Tax Court was reviewed by the United States Court of Appeals for the Third Circuit under Section 7482 of said Code.

ARGUMENT FOR PETITIONER.

There are two compelling reasons why this petition for certiorari should be granted:

1. The decision is *admittedly in direct conflict* with the decision of the Court of Appeals for the Fifth Circuit in *Cotnam v. Commissioner*, 263 F. 2d 119.

2. The problem is of importance to every employee with job tenure, state, county and municipal as well as federal, and decreases the protection of civil service.

I. The Conflict.

In the case at bar, the Court of Appeals for the Third Circuit adopted the opinion of the Tax Court, which Court in explaining its refusal to follow in the instant case the decision in *Cotnam v. Commissioner*, 263 F. 2d 119 (C. A. 5), wrote as follows (38 T. C. 707):

> "We reached a similar result in *Ethel West Cotnam*, 28 T. C. 947, where the taxpayer had obtained a judgment of $120,000 in an action brought by her in an Alabama court against the estate of a decedent who had orally agreed during his lifetime to make a will bequeathing to her an amount equal to one-fifth of his estate in consideration for personal services rendered by her to him during the remainder of his life.
>
> "This court held that the $120,000 was the taxpayer's income and that her attorneys had only a lien which gave them the right to retain or receive the amount of their fees for their services."

"Our decision in *Cotnam*, in so far as it related to the method of applying Section 107* to the amount recovered by the taxpayer, was reversed in *Cotnam v. Commissioner*, 263 F. 2d 119 (C.A. 5)."

The Court of Appeals for the Fifth Circuit, in reversing the Tax Court, held that without the professional services of her lawyers the value of Mrs. Cotnam's claim was *nil*; and wrote (p. 127):

"The services of her attorneys resulted in converting that claim into a judgment and the collection of the judgment. The amount of the contingent fee was earned, and well earned, by the attorneys.

"True, in a remote rather than a proximate sense, the entire amount of the judgment had also been earned by Mrs. Cotnam, but she could never have collected anything or have enjoyed any economic benefit unless she had employed attorneys, and to do so she had to part with forty per cent of her claim long before the realization of any income from it. The only income, the only real **economic benefit**, which Mrs. Cotnam ever received was the $75,254.17 which she collected. (In our opinion, it is as illegal as it is unjust to tax her on the remaining $50,363.83 which did not pass through her hands and of which she never had control.) In a realistic sense the remaining $50,365.83 was income of the attorneys, not of Mrs. Cotnam."

In the case at bar, the only *economic benefit* to our taxpayer was $7,929.94. To argue otherwise is pure scholasticism. To say he *received* $16,173.05 is a semblance not a reality. The reality is, **that he received $7,929.94.** And the tax is imposed by *Section 1303* on the amount **received.**

* Of the Internal Revenue Code of 1939. Now Section 1303 of the 1954 Code.

When the $7,929.94 is pro-rated over 1952-53-54-55, no deficiency income tax is due.

The phrase in *Cotnam*:

> ". . . she could never have collected anything or have enjoyed any economic benefit unless she had employed attorneys . . ."

which fits the instant case as well, shows the **obvious** distinction between *valueless claims* for compensation and the cases *cited by the Tax Court: Helvering v. Horst*, 311 U. S. 112, where counsel was not needed to collect bond coupons (which the taxpayer had given away), and *Helvering v. Eubank*, 311 U. S. 122, where no lawyers were needed to collect renewal insurance commissions (which the taxpayer had assigned).

> "Taxation is an intensely practical matter, and it deals with realities not semblances; with substance and not form . . ." *Thompson v. Comm.*, 205 F. 2d 73, 78.

The income tax is imposed upon the "economic benefit" to the taxpayer: *U. S. v. Drescher* (CCA 2), 179 F. 2d 863, 865.

II. The Law.

Nor can we accept the Tax Court's statement that the Internal Revenue Code "is silent as to expenses incurred in connection with any collection of back pay."

The definition of "back pay" in *Sec. 1303 (b) (1) (B)* includes:

"(B) dispute as to the liability of the employer to pay such remuneration, *which is determined after the commencement of court proceedings;*" (Emphasis supplied.)

It is unreasonable to conclude that "court proceedings" do not include the costs thereof and the costs of representation by counsel. Congress never intended a wrongfully discharged employee should act as his own lawyer. The right of a litigant in "court proceedings" to counsel learned in the law is inherent.

Further, this is *remedial* legislation and should be liberally construed. The act says "the amount of back pay **received** . . ."

That the problem in the case at bar is one which should be resolved by your Honorable Court is apparent from the statement in the first paragraph of the *Opinion* of the Tax Court, to the effect that the Commissioner changed his position at the bar of the Tax Court from that set forth in his statutory notice of deficiency and in the pleadings before the Tax Court. To begin with: the taxpayer's 1957 return was prepared by the "taxpayers' service" desk of the local District Director. Then the statutory notice took one position; then another at the bar of the Tax Court—which it, and the Court of Appeals, adopted.

We respectfully submit that the correct answer is that given by the Fifth Circuit in *Cotnam v. Commissioner*, 263 F. 2d 119. We feel that decision is based on realities, not semblances, and on the Internal Revenue Code construed both literally and literally.

Wherefore your petitioner, Walter F. O'Brien, respectfully prays that a writ of certiorari be issued to the United

States Court of Appeals for the Third Circuit (as of No. 14,321).

Respectfully submitted,

WALTER F. O'BRIEN,
Petitioner.

By: HENRY D. O'CONNOR,
Attorney for Petitioner.

APPENDIX.

Argued June 17, 1963.

Before BIGGS, *Chief Judge*, and STALEY and FORMAN, *Circuit Judges*.

OPINION OF THE COURT.

(Filed July 31, 1963.)

PER CURIAM.

We find the decision of the Tax Court is correct in all respects and accordingly it will be affirmed on the excellent opinion of Judge Raum. 38 T. C. 707.